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In the Supreme Court of the United States

OCTOBER TERM, 1962

E. M. DANIELS, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*,

vs.

INTERSTATE COMMERCE COMMISSION, and GREAT NORTHERN RAILWAY COMPANY,
Intervening Appellees.

APPEAL FROM JUDGMENT OF THREE-JUDGE FOR THE DISTRICT OF MONTANA, BUTTE DIVISION

MOTION TO AFFIRM

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Appellee

HELENA INDEPENDENT-RECORD

In the Supreme Court of the United States

OCTOBER TERM, 1962

W. M. DANIELS, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*,

vs.

INTERSTATE COMMERCE COMMISSION, and GREAT NORTHERN RAILWAY COMPANY,

Intervening Appellees.

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1 (c), of the Revised Rules of the Court, Appellee moves that the judgment of the District Court be affirmed on the grounds that the questions raised by Appellant are so insubstantial as not to warrant further argument.

STATEMENT OF THE CASE

This is a direct appeal from a judgment of a statutory three-judge District Court, entered October 29, 1962, pursuant to 28 U.S.C. 2321-25 which affirmed an Order of the Interstate Commerce Commission in Docket No. MC-C-2507, *W. M. Daniels—Investigation of Second Proviso Eligibility*, denying Appellant's application for registration of an interstate certificate

under the second provisions of 49 U.S.C. 306(a)(1). The petition for re-hearing and for new trial was denied by Supplemental Opinion of the District Court issued December 13, 1962.

Appellant was issued a Certificate or Permit by the Montana Board of Railroad Commissioners authorizing *interstate* service between Missoula and Helena; Missoula and Miles City via Butte; and between Butte and Great Falls (all points are in Montana). This Certificate was issued in 1933 prior to the enactment of the Federal Motor Carrier Act (49 U.S.C., Part II) in 1935. It did not authorize any intrastate service of any kind, but only interstate service between points within the State of Montana. Application for registration of the interstate certificate was filed with the Interstate Commerce Commission on December 31, 1933, March 8, 1957 and on February 3, 1958, and was, in each instance, denied by the Commission. Thereafter, on January 23, 1959, the Interstate Commerce Commission directed investigation by the Bureau of Inquiry and Compliance in Docket No. MC-C-2507. As a result of this investigation final Order of the Interstate Commerce Commission denying the application for registration under Section 206 (a)(1) of the Motor Carrier Act was issued on November 21, 1961

Appellant filed this proceeding seeking review of the Order of the Interstate Commerce Commission by the District Court. After full briefs and argument, the District Court concluded that the Interstate Commerce Commission Order was in accordance with the applic-

able law and that the complaint should be dismissed. The Court issued its Per Curiam Opinion dated October 19, 1962, Judgment, dated October 29, 1962 and Supplemental Opinion dated December 13, 1962. The opinions are not officially reported but are set forth in Appendix "A" of Appellant's Statement of Jurisdiction.

ARGUMENT

The decision of the District Court does not present any question of substance warranting further argument in this Court. The Court has fully considered the applicable provision of the Interstate Commerce Act as applied to the record before the Commission pursuant to stipulation. The affirmance of the decision below will be fully consistent with the prior decisions of this Court.

1.

THE ONLY APPLICABLE LAW IS SECTION 49 U.S.C. 306 (a)(1) (SECTION 206 (a)(1) MOTOR CARRIER ACT)

Appellant's argument is based on a contention that the Montana Railroad Commission had a right to issue to appellant an interstate authority between points in the State of Montana, and that such an authority has to be registered by the Interstate Commerce Commission. However, at the same time appellant recognizes that authority to transact interstate business requires authority of the Interstate Commerce Commission

when he seeks to force registration of a state permit by that Commission.

The only authority, and that which appellant seeks to invoke, for registration of a state certificate by the Interstate Commerce Commission is that contained in 49 U.S.C. 306 (a) (1). It is recognized throughout the record and in the statement of jurisdiction, that appellant does not now have any corresponding intrastate authority.

So far as registration of the certificate is concerned, it is wholly immaterial whether the Montana Railroad Commission has authority to issue an interstate permit. The only agency which has been empowered by Congress to regulate motor carrier transportation in Interstate commerce is the Interstate Commerce Commission, pursuant to Part II of the Interstate Commerce Act (49 U.S.C. 301 et seq).

Appellant asserts that there is a conflict in respect to state and federal powers and the conflicting views of the decision of the Montana Supreme Court (*Daniels v. Board of Railroad Commissioners*, 131 *Mont.* 9, 306 P. 2d 264). We are concerned with interpreting a Federal law. The Montana Court has not purported to interpret the Interstate Commerce Act in the above decision. There is nothing in the above decision holding that the certificate comes within the provisions of the Federal Act. We are concerned only with rights under the Federal Act.

II.

THE ONLY AUTHORITY ISSUED BY A STATE WHICH MAY BE REGISTERED AS THE BASIS OF PERFORMING INTERSTATE BUSINESS IS AN AUTHORITY TO PERFORM INTRASTATE BUSINESS

Appellant seeks to register his authority under the provisions of the second proviso of 49 U.S.C. 306(a)(1) which reads as follows:

> "* * * And provided further, that this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates anf if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this chapter."

The certificate referred to has always been considered as a certificate authorizing intrastate service. The registration would only allow interstate service to the same extent as intrastate. The authorities are cited and adequately discussed in the Court Opinion and will not be repeated. This Court has decided, in *Buck v. Kuykendall* (1925) 267 U.S. 307, 45 S. Ct. 324, 60 L. Ed. 623, that the right of the states over interstate commerce is limited to matters of safety and use of the highways. In *Fry Roofing Co.* v. Word (1952), 344 U.S. 157, 73 S. Ct. 204, 97 L.Ed 168, the Court held

that the state could require registration of interstate authority so long as the state claimed no discretionary right to refuse to grant the permit. The Montana Motor Carrier Act provides that an interstate carrier is not required to make any showing of convenience or necessity (Section 8-123, Revised Codes of Montana, Appendix C to Appellant's jurisdictional statement).

The facts, the statutes and prior decisions cited by the District Court fully justified its conclusion in this case, stated as follows:

> "As the Supreme Court said in Castle v. Hayes Freight Lines, supra, under the Motor Carrier Act of 1935 the federal plan of control over carriers engaged in interstate commerce was all embracing, including exclusive power in the federal government to determine what carriers could or could not engage in interstate commerce. An exemption authorizing a state commission to issue interstate certificates of public convenience and necessity to carriers who had no corresponding intrastate rights would produce a result contrary to the policy of the Act.
>
> "The second proviso of § 206(a)(1) was but one of three methods by which interstate operating rights could be acquired or confirmed. Those motor carriers who were in "bona fide operation" on June 1, 1935, under interstate permits issued by a state could claim exemption under the 'grandfather' clause contained in the first proviso. If they could not qualify under the grandfather clause, they could apply under § 207(a) for the acquisition of a new operating authority upon proof of public convenience and necessity. Plaintiff himself utilized both procedures. The only reasonable construction of the second proviso con-

sistent with the policy of the Act is that adopted by the Commission, i.e., to authorize carriers with *intrastate* certificates to obtain interstate authority over the same route without proof of public convenience and necessity under § 207."

Appellants filed a petition for rehearing and motion for new trial. This petition was, in part, based on the amendment of Section 49 U.S.C. 306(a)(1) contained in Public Law 87-805, 87th Congress, October 15, 1962. This amendment is set forth in Appendix C to the jurisdictional statement. It changes the method of issuing interstate authority to operators in intrastate commerce within a single state. The amendment clearly shows that intrastate operation is essential before any interstate authority over the same route may be claimed. The Supplemental Opinion refers to the Legislative history of the amendment as requiring intrastate operation. The Court, in denying the petition for re-hearing or new trial, said:

> "Plaintiff here seeks registration of a certificate authorizing *interstate* operations *only*. Plaintiff's certificate does not cover any *intrastate* operations; nor does plaintiff hold any other *intrastate* rights over the same route.
>
> "Under section 206(a)(1), both prior to amendment and after amendment, *intrastate* rights and an *intrastate* certificate form the basis of acquisition of interstate rights within the state. No grant of interstate rights is contemplated to a carrier who has no corresponding intrastate rights. In this respect no change was effected by Public Law 87-805."

CONCLUSION

We respectfully submit that the decision of the District Court correctly interprets the applicable law. Where appellant does not hold authority to perform intrastate state business there is no authority under the Interstate Commerce Act for registration of an interstate permit issued by the state. The Motion to Affirm the judgment appealed from should be granted.

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Appellee